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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1141

PACKAGE DEVICES, INC., *Petitioner,*

vs.

SUN RAY DRUG CO., *Respondent.*

PACKAGE DEVICES, INC., *Petitioner,*

vs.

OWENS-ILLINOIS GLASS COMPANY, *Respondent.*

PACKAGE DEVICES, INC., *Petitioner,*

vs.

WYETH LABORATORIES DIVISION AMERICAN HOME PRODUCTS CORPORATION, *Respondent.*

PACKAGE DEVICES, INC., *Petitioner,*

vs.

E. J. KORVETTE, INC., *Respondent.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This is an ordinary patent suit. Petitioner charged Respondents with infringement of claim 2 of the Jesnig patent 2,620,938, issued December 9, 1952, upon an application filed September 2, 1949. The patent in suit is directed to the combination of a bottle and a rubber or plastic snap cap therefor, the alleged improvement residing primarily in the shape of the neck ring of the bottle over which the cap snaps. The single claim at issue is found in the Appendix,* pages 5 and 6, and is precisely and concisely analyzed by the District Court on pages 12 and 14 of the Appendix.

PETITIONER PRESENTS NO CASE OR CONTROVERSY BUT ONLY SEEKS AN ADVISORY OPINION WITH RESPECT TO 35 U. S. C. 102(b) AND THE VALIDITY OF ITS PATENT.

The District Court found that the Owens-Illinois accused structure bottle finishes all have a radius of 1/64 to 1/32 of an inch at the juncture of the upper and lower surfaces of the neck ring. (App. 10.)

To determine the meaning of the term "apex", the District Court painstakingly examined the prosecution file history of the patent in suit, as set forth in Findings of Facts 17 through 22 (App. pages 3-5), and found:

> "It is clear from the file wrapper that Mr. Jesnig interpreted apex to mean a non-radial juncture. He characterized apex to mean a 'peak or line,' 'knife edge,' and 'circular edge.' * * *.

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* The Appendix bound to the Petition is referred to herein as "Pet. App." and Petitioner's other separate Appendix containing the opinion, and judgment of District Judge Fullam and the judgment of the Court of Appeals for the Third Circuit is referred to herein as "App.".

> "* * * Common sense, and the inventor's own statements indicate that apex means a sharp-line juncture point of the upper and lower surfaces of the neck ring." (App. 14.)

The District Court also carefully analyzed the testimony of plaintiff's expert, Dr. Mauchly (App. 21-24), and then concluded that claim 2 at issue was not infringed. (Conclusion of Law 6, App. 29.) This finding of non-infringement was affirmed on appeal. (Plaintiff's Pet. App. 15, 432 F. 2d 272.)

Infringement is a question of fact, *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 86 L. Ed. 1537 (1941); *Stilz* v. *United States*, 269 U. S. 144, 70 L. Ed. 202 (1925).

Thus, at the outset we are confronted with concurrent findings of the District Court and the Court of Appeals that the claim in issue is not infringed.

As this Court said in *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 366 U. S. 271, 275, 93 L. Ed. 672, 677 (1948):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (Citations omitted.)

No such showing is made by Petitioner. The opinion of the District Court with its numerous findings of fact and careful analysis of the prior art and the testimony of plaintiff's expert witness, Dr. Mauchly, shows that there was substantial evidence to support the finding that the claim in issue was not infringed.

Petitioner does not seek a review of the Court of Appeals for the Third Circuit's affirmance of the District Court's

conclusion that claim 2 in issue is not infringed but prays only:

> "that the judgment of the Court of Appeals for the Third Circuit holding the Jesnig patent invalid be reversed." (Petition, pages 9, 10.)

Thus, there is no longer any controversy between the parties to this litigation, *Cover* v. *Schwartz*, 133 F. 2d 541 (2nd Cir. 1942). As this Court has said:

> "To hold a patent invalid if it is not infringed is to decide a hypothetical case." *Altvater* v. *Freeman*, 319 U. S. 363, 87 L. Ed. 1453 (1942).

Since this controversy has been terminated by the judgments and the concurrent findings of the District Court and the Court of Appeals that the claim in issue is not infringed, there is no need for this Court to review and rule on the issue of validity.

Further, the issue of infringement is not raised by the questions Petitioner has presented for review and, hence, this issue should not be considered by this Court, Rules of the Supreme Court of the United States, Rule 23(c).

THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT AND IN FACT IS IN AGREEMENT WITH THE DECISION OF THE COURT OF CUSTOMS AND PATENT APPEALS ON THE SAME MATTER.

In holding claim 2 in issue invalid under 35 U. S. C. 103, the District Court considered prior art patents, publications and public uses having effective dates prior to Jesnig's date of invention* and also prior art publications

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* Circuit Judge Biggs took note of this stating:

> "As stated previously there are prior art references published more than one year prior to the date of Jesnig's invention." (Pet. App. 14.)

and public uses having effective dates more than a year before the Jesnig application for the patent in suit was filed but subsequent to Jesnig's invention date. (App. 25.) The Court of Appeals for the Third Circuit held that the District Court did not err by considering all of the prior art references in concluding that the patent in suit was invalid but that the District Court in bottoming its decision on 35 U. S. C. Section 103 did not apply the correct standard of law but reached the right result. The Court of Appeals apparently concluded that under Section 103 obviousness must be determined "at the time the invention was made" but it held the patent in suit invalid under Section 102(b) containing the critical bar date of one year prior to the patent application and used that date as the time for determining patentability by the obvious—non-obvious test.

The Court of Appeals held the patent in suit invalid under Section 102(b) and based its decision on the principles enunciated in *Application of Foster*, 343 F. 2d 980 (C. C. P. A. 1965), certiorari denied 383 U. S. 966 (1966): namely, that where the one year time bar of 35 U. S. C. Section 102(b) is involved, which is the case here, in determining the obviousness of the invention the actual date of the invention of the patent in suit becomes irrelevant and a reference having a date more than one year prior to the applicant's filing date is effective even though the invention was made prior to the date of the reference. The Court of Appeals for the Third Circuit held that Section 102(b) implicitly contains the obvious—non-obvious test of Section 103. (Pet. App. 14.) Thus construing Section 102(b) the Court of Appeals agreed with the District Court that the prior art rendered the Jesnig invention obvious and not patentable. (Pet. App. 13.)

Petitioner contends that Section 102(b) does not provide for invalidation of a patent where the invention is not

completely disclosed in a single prior art patent, publication, or public use and where a plurality of references are necessary to show want of patentable invention or the obviousness of the purported invention to a person having ordinary skill in the art to which the invention pertains. Prior to *Application of Palmquist, et al.*, 319 F. 2d 547 (C. C. P. A. 1963), the United States Court of Customs and Patent Appeals had consistently held that a plurality of references may be used in rejecting a claim for a patent under Section 102(b) where the references were published more than a year before the application even though the date of invention of the subject matter sought to be claimed was prior to such publications. *In re Wenzel*, 88 F. 2d 501 (C. C. P. A. 1937); *Application of Ruscetta*, 255 F. 2d 687 (C. C. P. A. 1958); *Ex parte Austin*, 72 USPQ 384 (Patent Office Board of Appeals, 1946).

In *Application of Palmquist et al., supra*, the Court held that only a single reference may be used to show the loss of a right to a patent and that under Section 103 the obviousness of the invention must be determined at the time the invention was made and not at a time one year before the application was filed. *Application of Palmquist et al.* thus enunciated new law and upon a more careful consideration of the *Palmquist* decision the Court of Customs and Patent Appeals in *Application of Foster, supra*, overruled *Application of Palmquist et al.* and clearly held that a reference having a publication date more than one year prior to the United States filing date to which the application was entitled cannot be disposed of by date of invention earlier than the date of the reference. 343 F. 2d 989. In *Application of Foster*, the Court speaking through Judge Almond, carefully reviewed the decisional law prior to the 1952 Patent Act which is represented to be a codification of the prior decisional law and concluded that:

> "where the time-bar is involved, *the actual date of invention becomes irrelevant* and that it is not in accordance with either the letter or the principle of the law, or its past interpretation over a very long period, to permit an applicant to dispose of a reference having a date more than one year prior to his filing date by proving his actual date of invention." (343 F. 2d 989.)

As Circuit Judge Biggs in commenting on the Palmquist doctrine stated:

> "We believe that *Foster* was correctly decided and we deem it unnecessary to elucidate the facts of *Foster* and the reasoning of Judge Almond. We find his opinion to be clear and convincing, * * *." (Pet. App. 14.)

The interpretation of Section 102(b) in *Application of Foster, supra*, has been followed consistently in the United States Court of Customs and Patent Appeals, *Application of Folkers*, 344 F. 2d 967 (C. C. P. A. 1965); *Application of Hasxler*, 347 F. 2d 911 (C. C. P. A. 1965).

Petitioner would have this Court believe that an inventor after making an invention could withhold it from the public as long as he pleased even though the invention had become obvious subsequent to the date of invention but more than a year before his application for a patent by a single reference plus the skill of the art involved or by a plurality of references such as printed publications and public uses. As Judge Almond stated in *Application of Foster*, 343 F. 2d at 990:

> "The wrong in such a construction of the statute—beside giving it a meaning that was never intended—is that it permits an inventor to sleep on his rights more than a year after the invention has become entirely obvious to the public, whereby the public has potential possession of it, and still obtain a patent which will take the invention from the public, a result Con-

gress could not possibly have intended in view of its express indication that section 102(b) is merely a continuation of the prior law."

Petitioner has cited no cases contrary to *Application of Foster, supra*, but contends that the decision below is in conflict with *Walker* v. *General Motors Corp.*, 362 F. 2d 56, 58 (9th Cir. 1966); *Ceramic Tiles Supply, Inc.* v. *Tile Council of America Inc.*, 378 F. 2d 283, 284 (9th Cir. 1967); *McCullough Tool Co.* v. *Well Surveys, Inc.*, 343 F. 2d 381, 398 (10th Cir. 1965); *Soundscriber Corp.* v. *United States*, 360 F. 2d 954, 960 (Ct. Cl. 1966).

None of these cases involve the fact situation present in this case and in *Foster;* namely, that the prior art or references relied upon in finding the patent in suit invalid contained references having effective publication or prior use dates more than one year before the application for the patent in suit was filed but subsequent to the invention date of the patent in suit. The Court in each case had before it references having effective dates prior to the invention date of the patent in suit and more than one year prior to the filing date of the application for the patent in suit and thus bottomed their decisions on Section 103.

The Walker Case.

The *Walker* case is inapposite to the *Application of Foster* because the question presented did not involve an invention date by plaintiff Walker earlier than the French publication which disclosed all the elements of the Walker patent. In the French reference, the fender and gas tank were constructed as an integral unit. Of the three claims in the suit, claim 3 was held invalid on grounds of anticipation 35 U. S. C. 102(b); however, claims 1 and 2 were drawn to the separate unit construction of fender and tank and a question arose as to equivalency. The Court said:

> "Since the issue of equivalence could not be determined without resolving these disputed questions of fact, we conclude that as to claims 1 and 2 summary judgment on the grounds of anticipation was not appropriate." (362 F. 2d 58.)

Plaintiff accepted the fact that the French reference was prior art as to the Walker patent. The issue of the law suit did not involve whether or not the French reference was an anticipation of claims 1 and 2 under Section 102(b) but rather whether this issue could be decided on motion for summary judgment. The Court held that it could not be decided on summary judgment and then proceeded to hold claims 1 and 2 invalid for obviousness under Section 103.

The Soundscriber Case.

In the *Soundscriber* case one of the defenses raised to the complaint related to the prior work of one Camras, which work was prior to the date of invention of the claim at issue. This raised the defense that:

> "the alleged invention defined in claim 6 of the '449 patent is invalid because it had been known to or used by others in this country prior to the invention thereof;" (360 F. 2d at 957.)

Soundscriber thus presented the question of *novelty* under Section 102(a) whereas *Foster* dealt with loss of right to a patent, Section 102(b).

Ceramic Tilers Case.

Ceramic Tilers is distinguishable from *Foster* because the prior art Spillman patent relied upon as an anticipation was not questioned as being prior to the time of the making invention of the patent in suit. The Spillman reference was qualitatively attacked as it was not complete enough

to anticipate and evidence taken at the trial was insufficient to evaluate the obviousness question under Section 103 so the case was remanded to the lower Court.

The McCullough Tool Case.

In *McCullough Tool* in considering the defense that the Pringle patent was nothing more than an aggregation of elements old in the art and thus comes within the rules of the *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147, 95 L. Ed. 162 (1950), the Court stated:

> "Of course, to establish *anticipation* in such a situation, it is not necessary that all of the elements be found in a single patent or publication. It is enough if the whole of the prior art considered together discloses all of the claimed elements and that no new functional relationship arises from their combination." (Italics supplied.) (343 F. 2d 398.)

McCullough clearly distinguishes between anticipation, a Section 102 defense, and the obvious—non-obvious defense of Section 103 and in so doing definitely holds that anticipation can be established by a plurality of prior art patents or publications.

Thus not one of the four decisions relied upon by Petitioner presented the factual situation present in this case; namely, that the combination of prior art references relied upon to invalidate the patent in suit had effective bar dates more than one year before the application for the patent in suit but subsequent to the invention date and thus were not concerned with the ruling made by Judge Biggs here and previously in *Foster* and the other cases cited; namely, that such references are effective under Section 102(b) which implicitly contains the obvious—non-

obvious test. The questions raised by the petition were never reached in these four decisions in the factual context of the present case.

Petitioner would have this Court believe that the 1952 Patent Act changed the prior decisional patent law which it has been consistently represented to codify and would remove from the prior art any reference which does not completely show every element of the claim at issue and where the reference has a date subsequent to the invention date of the patent in suit even though the reference was public knowledge and in the public domain more than a year before the application for the patent in suit was filed. The practice in the Patent Office has always been to the contrary. The present Patent Office Rule 131 (Pet. App. 16) and its predecessor Rule 75 (footnote 8, 343 F. 2d 987) have always provided that an applicant for a patent cannot swear back of and remove a reference published more than a year before the application filing date even though the applicant's invention date was prior to the publication of the reference.

"Anticipation" is not found in either Sections 102 or 103 of the Patent Act. Petitioner states (Pet. p. 8):

> "'Anticipation' of a claimed invention always required that the basic concept involving the invention be found in a single reference, even when secondary references were used to show details not related to the basic concept."

Thus Petitioner admits that "anticipation" can be supported by secondary references. The only purpose of secondary references would be to combine them with the principal reference to show that the subject matter of the claim at issue involved differences that were such a slight advance over the prior art that they were insufficient to support a patent, *International Tooth Crown Co.* v. *Gay-*

lord, 140 U. S. 55, 62, 35 L. Ed. 347, 350 (1890), or merely involved

> "the work of a skillful mechanic, not that of the inventor." *Hotchkiss* v. *Greenwood*, 11 How. 248, 267, 13 L. Ed. 683, 691 (1850).

Petitioner states:

> "Section 35 U. S. C. 103 limits Section 102(b) to cases where the invention is 'identically disclosed' without regard to whether the disclosure involved one or more references." (Pet. p. 8.)

Here again Petitioner admits that a plurality of references can be used in invalidating under Section 102(b). Section 102(b) does not refer to "identical disclosure", while Section 103 does. To read this limitation of Section 103 into Section 102(b) does not make sense and leads only to confusion. This Court has ruled that the "prior art" referred to in Section 103 means:

> "what was known before as described in section 102." *Graham* v. *John Deere Co.*, 383 U. S. 1, 15, 15 L. Ed. 2d 545, 555 (1966).

If, as Petitioner contends, Section 102(b) requires as a condition for lack of patentability a single reference containing an identical disclosure to that of the claim at issue, that is, all the same elements found in exactly the same situation and united in the same way to perform the identical function, then there would be no differences between the subject matter sought to be patented and the prior art of Section 102 as defined above by this Court and Section 103 becomes meaningless. Thus, one cannot read the limitation "identically disclosed" of Section 103 into Section 102(b) without leading to hopeless confusion and ambiguity. Section 103 clearly indicates that there may be differences between the claim at issue and the prior art encompassed by Section 102 and thus the principle of the

Foster case and that followed by Judge Biggs; namely, that Section 102(b) implicitly contains the obvious—non-obvious test, is supported rather than rejected by the wording of Section 103.

The paucity of decisions since *Application of Foster* involving its factual situation and the ruling thereon shows that there is here presented no question of public importance. This Court denied a Petition for Writ of Certiorari in *Application of Foster*.

CONCLUSION.

Since Petitioner presents no case or controversy and the decision below follows the ruling in *Application of Foster* and is not in conflict with decisions of other Courts of Appeals, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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The question of infringement is directly related to the questions presented by Petitioner

Respondents contend that "the issue of infringement is not raised by the questions Petitioner has presented for review and, hence, this issue should not be considered by this Court. . . ." (Respts. Br. 4). Petitioner disagrees with this contention.

Petitioner stated in the Petition

> ". . . The holding of non-infringement was based on limiting the doctrine of equivalence because of prior art which also included references which came into being after the Jesnig invention. Consequently, both the holdings of invalidity and non-infringement by the District Court were based on consideration of references occurring after the Jesnig invention" (Pet. App. 5).*

The District Court held

> ". . . Looking at the '938 patent in the light of Dunfee, Goebel, Stewart, the British patent, the Lumelite cap, the Kitchen Kap and the Flexeal finish, I am persuaded that the doctrine of equivalence is not properly applicable to result in a finding of infringement" (App. 28).

Drawings for the Kitchen Kap were in existence on April 10, 1947 and the Kitchen Kap was sold in July 1947 (Finding of fact 37, App. 9). The District Court also held that the Jesnig invention was February 7, 1947, which was prior to the Kitchen Kap-Flexeal finish combination (App. 15).

Most of the testimony presented by Respondents during the trial related to the Kitchen Kap-Flexeal finish combination. It is reasonable to assume therefore that

*"App. Pet." will refer to Petitioner's "Petition," which included part of the Appendix. "App." will refer to separate binder entitled "Appendix to Petition."

the District Court gave much weight to this combination. If this combination is inapplicable, then the District Court and the Court of Appeals erred in refusing to allow any range of equivalence and holding non-infringement.

The question of infringement, therefore, is directly related to the questions raised by the Petitioner.

The Court of Appeals for the Third Circuit did not discuss the issue of infringement except to say that it found the reasoning and conclusion of the District Court to be correct (Pet. App. 15).

There is no file wrapper estoppel

Respondents refer to statements of the District Court regarding the meaning of the word "apex," which appears in Claim 2 of the Jesnig patent (Respts. Br. 2, 3).

In addition to the parts quoted by Respondents, the District Court also held

> ". . . However, it is equally clear that the actual language of the final claim was not limited to avoid a prior art rejection. Rather, the final claim and the original claim are the same, and the limited claims were submitted in the interim. Therefore, the doctrine of file wrapper estoppel is not applicable" (App. 26).

In the absence of file wrapper estoppel, Petitioner contends than the word "apex" should be given its ordinary meaning.

The Jesnig invention was not "identically disclosed" in any combination of prior art references

Respondents stated that Petitioner contended that Section 102(b) requires as condition of patentability a single reference containing an identical disclosure to that of the claim at issue (Respts. Br. 12). While this is involved

in the second question presented by the Petitioner (Pet. App. 3), it is not the issue with respect to the third question.

The important point in the third question is: after all the applicable references are combined, is the *invention* "identically disclosed"? Whether two, three or a dozen references are relied upon is not important as far as the third question is concerned. Petitioner contends that the Jesnig inventive concept covered by his claim involves a positive on-off action of a cap with respect to a container, together with a double dynamic sealing effect between the cap and container. This concept was not shown or suggested in the applicable prior art even if multiple references are combined. Section 102(b) is therefore inapplicable.

Petitioner in effect is presenting two questions in the alternative in the second and third questions (Pet. App. 3). If either the second or third question is answered in the affirmative, then the Jesnig patent should be considered valid and infringed.

Respectfully submitted,

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